# APPENDIX

## APPENDIX 1.

# COURT OF APPEALS OF KENTUCKY

RENDERED: JUNE 7, 1968

431 S. W. 2d 867

CURTIS SHIPP, ET UX., - - - - *Appellants,*

*v.*

LOUISVILLE AND JEFFERSON COUNTY AIR BOARD, ET AL., - - - - *Appellees.*

*Appeal from Franklin Circuit Court,*
*Honorable Henry Meigs, Judge.*

## OPINION OF THE COURT BY JUDGE EDWARD P. HILL—REVERSING.

The appeal seeks to upset a judgment authorizing appellees to remove the tops of two oak trees standing on appellants' residential property, which appellees claim violate rules and regulations promulgated by the Kentucky Airport Zoning Commission (hereafter K.A.Z.C.) and constitute a hazard to the safe and modern operation of Standiford Field in Jefferson County, Kentucky.

This action was commenced by K.A.Z.C. under KRS 183.873; subsequently, Louisville and Jefferson County Air Board (hereafter Air Board) was allowed to intervene. The action was dismissed as to K.A.Z.C., and its complaint is not in this record. Apparently the trial court held that K.A.Z.C. could not maintain its suit for the reason that its

proper remedy was to condemn the trees pursuant to the provisions of KRS 183.872.

The trial court decided that the Air Board had made a more substantial claim and that it has a "prescriptive right" to the public, unobstructed use of the stratum of air space over appellants' property for the purpose of the landing and the take-off of aircraft from its airfield, including the space in which its VASI equipment operates.[1]

The case was tried on an agreed stipulation of fact from which we find that one of the trees is 50.9 feet tall; that the other is 39.7 feet tall; that pin oak trees grow at the rate of "one or one and one-half feet per year in Kentucky"; that appellants purchased their property in 1963. Obviously the trees were more than twenty feet high when appellants purchased their property.

The judgment appealed from ordered that appellants allow appellees to enter upon their land and top the trees so that the stubs shall not exceed 20 feet in height from the ground. Bond was required of appellees to protect appellants from any consequential injury or damage to the remainder of their property, but not for any damage resulting from the loss of parts of the trees.

It is conceded that appellants have a right under KRS 183.133 to condemn the obstructing trees as did K.A.Z.C. under KRS 183.872, but this is not a condemnation proceeding. Appellees contend that "if the Air Board, after 25 years of operation, must condemn every tree that grows

[1]This equipment projects three color bars or layers of light for some distance from runways used by landing aircraft. While landing, the pilot endeavors to keep within the middle color bar. If he flies into either of the other color bars, he is too high or too low for instrument landing and can correct his course accordingly. Any obstruction in the path of the space covered by these color bars that extends more than twenty-five feet high will interfere with the desired performance of the VASI equipment. It is claimed that the Federal Aviation Administration will not permit the use of this equipment until the trees are cut low enough to allow the light to pass.

up into the approach zone, an impossible burden is placed on its shoulders." True since 1942, this airfield has been operated either by the Air Board or by the Federal Government as stipulated.

Appellants contend the law does not authorize prescriptive air easements; that if the court should find such an easement does exist, it should be limited by its actual use and exercise over the last fifteen years and cannot be enlarged upon or expanded for an entirely new purpose; and that the judgment of the trial court amounts to a taking of their property in violation of the State and the Federal Constitutions.

Appellees contend that they have acquired, on behalf of the public, a prescriptive right to a "clear zone" approach to runway 19 at an angle or glide path of one foot rise or fall for each fifty-foot distance, depending upon whether there is a landing or a takeoff; that its right arose in 1956, fifteen years after the field went into operation; and that the Air Board has the right and the duty to remove obstructions from the "clear zone" existing since 1956.

The trial court adjudged that appellees have a "prescriptive right to the public, unobstructed use of the lower stratum of air space" over appellants' property.

Congress exercised its constitutional power to regulate interstate air commerce by providing in 49 U.S.C. § 1304 that there be "public right of transit through navigable airspace of the United States"; and then defined "navigable airspace" in 49 U.S.C. § 1301(24) as:

> "[T]he airspace above the minimum altitude of flight prescribed by regulations issued under this Chapter and shall include airspace needed to insure safety in take-off and landing of aircraft."

This airspace has been held to be within the public domain. Cf. City of Newark, New Jersey v. Eastern Airlines, D.C. (N.J.), 159 Fed. Supp. 750 (1958).

It is concluded that the Air Board has a right to "airspace above the minimum altitude of flight prescribed by reasonable" regulations issued under 49 U.S.C. § 1301(24), which "shall include airspace needed to insure safety in take-off and landing of aircraft."[1] Obviously this "airspace" would include the space into which VASI equipment operates. This right is one derived from an act of Congress in its exercise of police powers and the regulation of interstate commerce by air. After the adoption of the rules and regulations under 49 U.S.C. § 1301(24), no property owner in the path of the rays of the VASI equipment may erect or allow to grow any structure or tree so as to interfere with the operation of such equipment.

The Air Board has no prescriptive right for the simple reason it has not exercised adverse rights in the space involved for fifteen years; however, it appears that in the instant case, the trees had exceeded the 20-foot elevation objected to before the commencement of the use of VASI equipment and before the adoption of rules and regulations applying thereto.

Appellants' right to maintain and enjoy their trees was acquired before the right of the Air Board was fixed by law. Although appellants' right was not in conformity with the zoning rules of K.A.Z.C., nevertheless, such right is protected by the Constitution and may not be taken except by condemnation under KRS 183.133(4) and (5).

The judgment is reversed.

All concur.

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[1] Strother v. Pacific Gas & Electric Co., Cal., 211 P. 2d 624 (1949).

## APPENDIX 2.

# FRANKLIN CIRCUIT COURT

**Civil Action No. 71129**

KENTUCKY AIRPORT ZONING COMMISSION, - *Plaintiff,*
LOUISVILLE & JEFFERSON COUNTY
AIR BOARD, - - - - *Intervening Plaintiff,*

*v.*

SHIPP, - - - - - - - - *Defendants.*

## MEMORANDUM OPINION.

In this action, initiated by the Kentucky Airport Zoning Commission, it was determined that the original plaintiff could not remove defendants' trees by mandatory injunction, since that plaintiff had an adequate remedy at law by condemnation proceedings. Subsequently, Louisville & Jefferson County Air Board was permitted to intervene and set up its claim against the same defendants and their offending trees.

A much more substantial claim is made by intervenors as it is grounded in rights of property, well established and existing more than twenty-eight years, whereas, as more fully appears in the order denying original plaintiff's complant for injunction, removal of defendants' trees was sought in furtherance of an exercise of the police power of the state never conceived until 1961.

Most of the relevant and pertinent facts surrounding the situation giving rise to the suit have been stipulated between the parties. In addition, the Court takes notice, as it believes to be within its proper function, that many, if

not all approaches to airport runways are comprised of two parts, the first consisting of a base leg, perpendicular to the direction of the intended landing, and the final approach on alignment with the landing runway—or a combination of these two resulting in a radial or parabolic curve of flight producing an ultimate alignment, on a sloped path, with the runway on which landing is to be made.—It is also recognized that the economics of commercial aviation dictate flight-planning to result in "straight-in" approaches by southbound aircraft when and where local traffic directs landing on runways "16", "17", "18", "19",—and so on around the compass—but it is clear that not all, or perhaps even a majority of flights can be so completed without a final turn into the proper runway alignment.

Still greater precision and wider margins of safety are required in the execution of "instrument approaches", and it is in the operation of equipment employed to facilities and control this type of landing that intervenor seeks to enforce its claim to unobstructed use of the air space 1400 feet Northwardly of Runway 1-19 and 600 feet Westwardly of that center-line.

It has been determined that defendants' two pin-oak trees have grown, in the course of natural development, into the airspace above the area bounded by these coordinate points, perhaps before and certainly since dominion over the surface from which the trees spring was begun to be asserted by defendants (1963). Although a slope ratio of 50-1 has been established as a safety criterion, it is not possible as a matter of fact—nor as a matter of aeronautics —to determine whether, nor the extent to which flight has been made along this pre-determined slope within the airspace into which these trees now protrude, but it is certain from the nature of airports and the varied quality of man's efforts at aerial flight that this exact space—as well as much other—has been occupied frequently and persistently,

if not consistently, since 1939, at least until coincident growth of defendants' trees effectively prevented it.

Having thus procured and, through uninterrupted notorious user established prescriptive right to exclusive passage through the air-space in question, the Louisville & Jefferson County Air Board is entitled to keep the same open and unobstructed for its own uses and purposes, against obstruction or interference by any surface owner beneath.

By the allegations and prayer of its complaint intervenor seeks only to be allowed the right it claims, and which is so declared here, to cause topping or removal of defendants' encroaching trees *at its own expense.* Accordingly, it is ordered and adjudged that intervenor has such rights as herein set forth, by prior prescriptive acquisition, and may enforce same by topping or removal of defendants' said trees, at its own complete expense, saving defendants harmless from any and all consequential injury or damage to the remainder of their property by restoring the premises, after topping or removal of said trees to the same condition as that in which it may now be found, loss or curtailment of the two said trees excepted, and to secure defendants therein intervenors shall post with the Clerk of said Court bond, with sufficient surety thereon, in the sum of $2,500.00 before entering upon the premises of defendants. To the extent necessary to a determination that the requirements of the aforesaid bond have been satisfied this cause will remain on the docket for further consistent orders. For all other purposes this shall be and constitutes a final disposition of the action. Judgment may be entered in conformity hereto, counsel for intervenor to prepare and first exhibit same to counsel for defendants and counsel for plaintiff.

This 17th day of August, 1967.

/Sd/ Henry Meigs,
*Judge, Franklin Circuit Court.*

## APPENDIX 3.

THE COMMONWEALTH OF KENTUCKY

THE COURT OF APPEALS

Spring Term—June 7, 1968

CURTIS SHIPP, ET AL.,

*v.*

LOUISVILLE & JEFFERSON COUNTY AIR BOARD, ET AL.

CA 71129

*Appeal from a Judgment of the Franklin Circuit Court.*

### MANDATE.

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed for proceedings consistent with the opinion herein: which is ordered to be certified to said court.

It is further considered that the appellants recover of the appellees their cost herein expended.

A copy—Attest:
Dick Vermillion, C.C.A.
Doris Owens, C.C.A.
By (s) John C. Scott, C.D.C.

Issued October 18, 1968.